No. 567

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

RCA COMMUNICATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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Miscellaneous—Continued

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OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 695) is reported at 201 F. 2d 694. The decision of the Commission (R. 550) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1952. (R. 708). The petition for writ of certiorari was filed on January 26, 1953, and granted on March 7, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Federal Communications Commission, in licensing radiotelegraph circuits pursuant to the Communications Act of 1934, is precluded from authorizing a competing direct radiotelegraph circuit unless it is affirmatively established that the competition to be created will result in better service, lower rates, or some other definitely ascertainable benefit.

STATUTE INVOLVED

The pertinent sections of the Communications Act of 1934, as amended, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.* are set forth in the Appendix, *infra*, pp. 66–67.

STATEMENT

This case involves the validity of an order of petitioner, the Federal Communications Commission (R. 631–2), authorizing inauguration of a competing radiotelegraph service between the United States and certain European points also served by respondent, RCA Communications, Inc. (RCAC). On appeal by respondent, the Commission's order was reversed by the court below by a divided vote (R. 708).

CARRIERS AND SERVICES INVOLVED

Mackay Radio and Telegraph Company, Inc. (*Mackay*) is the carrier whose applications were

granted in the present proceeding.[1] It is a wholly owned subsidiary of American Cable and Radio Corp. (*ACdR*) which is in turn controlled by International Telephone and Telegraph Corporation. Mackay provides radiotelegraph service between the United States and a number of foreign countries. Immediately prior to the authorizations under review Mackay did not serve either Portugal or The Netherlands directly; it served Portugal indirectly via Lima, Peru, through a connection with All America (see below). The present Commission order authorizes Mackay to provide direct radiotelegraph service between the United States and Portugal and to provide radiotelegraph service between the United States and The Netherlands, both directly and via relay at Tangier.[2] (R. 555–7, 583, 595, 631–2.)

RCAC, the respondent here, renders an international point-to-point radiotelegraph service between the United States and many points throughout the world, including Portugal and The Netherlands. Exclusive of the points here at issue, eleven of the points served by direct circuit by RCAC are also served by direct circuit by Mackay. (R. 558, 569, 571, 595.)

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[1] Mackay is the petitioner in the companion case, No. 568, this Term.

[2] Mackay had also applied for authority to conduct direct radiotelegraph communications between the United States and Surinam. This application was denied by the Commission (R. 632) and is not in issue in the present proceeding.

The Commercial Cable Company (*Commercial*), like Mackay, is an operating subsidiary of AC&R. It conducts trans-Atlantic cable service between the United States and many countries, including The Netherlands and Portugal. (R. 555, 556, 569, 582–3, 595.)

All America Cables and Radio, Inc. (*All America*), which is also an AC&R subsidiary, conducts cable service between the United States and Central and South America and the West Indies, and operates international radiophone and radiotelegraph services through facilities in Colombia and Peru. As has been noted above, Mackay and All America together provided an indirect service between the United States and Portugal via Peru. (R. 555–6, 583, 595.)

Western Union,[3] in addition to its domestic telegraph system, has a system of submarine cables over which direct and indirect telegraph service is provided with points throughout the world. This system includes cable services between the United States and Portugal, and between the United States and The Netherlands. Thus Western Union serves by cable both of the points which Mackay has been licensed to serve by radiotelegraph. (R. 559, 568, 581.)

[3] Western Union was a party to the proceeding before the Commission (R. 559) but did not participate in the proceeding in the court below.

DEVELOPMENT OF THE RADIOTELEGRAPH INDUSTRY

The central question in this case is whether, in the factual context of this proceeding, the Commission was warranted in authorizing a second direct international radiotelegraph circuit between the United States and each of two points in order to provide competition between radiotelegraph services. Before turning to the particular factual situation presented, we shall trace briefly the history of competition in this field.

The commercial development of radiotelegraph began shortly after 1895, but prior to World War I telegraph service between the United States and overseas countries was maintained largely by cable companies. During that war satisfactory radio transmission and reception over long distances were developed for the first time (R. 559). In 1920 the Radio Corporation of America, the parent corporation of RCAC, established direct radiotelegraph circuits from the United States to Great Britain, Hawaii, Japan, Norway, Germany and France (R. 560). By 1934 RCAC was operating circuits to 40 points, and at the time of the hearing in the present case (1948) it maintained 65 circuits (R. 559–60). Mackay's first transoceanic circuit was established in 1929; by 1934 it had 13 overseas circuits in operation and authorizations for five additional circuits which were later opened (R. 561). At the time of the

hearing Mackay was authorized to communicate with 39 overseas points (R. 562).

The Commission's attitude with respect to the licensing of competing circuits in international radiotelegraph has varied over the years with the circumstances in the industry and in world affairs. From 1934 until 1939, when radiotelegraph was just emerging from its infancy, the Commission generally denied applications for circuits to countries already served by other American radiotelegraph carriers (R. 561). From 1939 to 1942 the Commission generally granted applications for new circuits, regardless of whether the points involved were served by an existing radiotelegraph circuit (R. 561-2). From 1942 to 1943 an affirmative policy of authorizing duplicating American circuits (a "duplicate circuit policy") was followed as a war measure at the behest of the Defense Communications Board (*ibid.*)[4] From 1943 until 1945, also as a war measure, the reverse course (a "single circuit policy") was followed at the behest of the Board of War Communications (the successor of the Defense Communications Board) (*ibid.*).[5]

From 1945 until the decision in the present case (1951) the Commission granted a number of

[4] During this period Mackay was granted temporary authorizations for circuits with 41 countries, of which 12 circuits were established (R. 562).

[5] During this period 11 applications for duplicating authorizations were denied (R. 621).

duplicating circuits.[6] And the Commission authorized resumption of duplicate services to countries which had been enemy occupied during the war. Moreover, outstanding duplicate circuit authorizations have been renewed by the Commission from time to time. The present case is the first in recent years in which an application for a duplicate circuit has been contested before the Commission; it is the only case in which the grant of a duplicating radiotelegraph circuit has ever been challenged in the courts (R. 621–2).

THE FACTS WITH RESPECT TO THE CHALLENGED AUTHORIZATIONS[7]

The decision of the Commission describes the nature of existing cable and radiotelegraph service throughout the world and discusses in detail the service, existing and proposed, between the United States and The Netherlands and the United States and Portugal. A summary of relevant factors is set forth below.

a. *Competitive situation.*—The following table reflects the cable and radiotelegraph service be-

[6] *E. g.*, Mackay was authorized to operate duplicate circuits to Paris, France, Berlin, Germany and the Dominican Republic; RCAC was authorized to operate a duplicate circuit to Vienna, Austria (R. 621–2).

[7] The court below did not overturn any of the probative findings by the Commission. Accordingly, the facts set forth in this Statement are drawn from the Commission's decision. Statements of fact in the present tense refer to the time of the hearing.

tween the points involved and the United States. The services authorized by the order under review are italicized.[7] "Inbound" refers to traffic coming in to the United States.

BETWEEN THE UNITED STATES AND THE NETHERLANDS[8]

CABLE	RADIO
Western Union—to Amsterdam via London—automatic retransmission outbound, semi-automatic inbound.	RCAC—direct to Amsterdam.
Commercial—to Rotterdam via Dire and London—no automatic retransmission at time of hearing.	*Mackay—direct to Amsterdam.*

BETWEEN THE UNITED STATES AND PORTUGAL[9]

CABLE	RADIO
Western Union—to Lisbon via Azores—automatic retransmission outbound, manual retransmission inbound.	RCAC—direct to Lisbon.
Commercial—to Lisbon via Azores—manual retransmission inbound and outbound.	Mackay—to Lisbon via Lima, Peru—from Lima handled by All America cable.
	Mackay—direct to Lisbon.

[8] R. 568–70.

[9] R. 581–3. When Mackay opened the direct Portugal circuit it discontinued service via Lima.

Mackay's arrangements with The Netherlands Administration of Posts, Telephones and Telegraph, its correspondent there, concerning division of tolls and for accounting and settlements will be the same as those of RCAC with the same correspondent (R. 572, 590–1). Under Mackay's arrangements with The Netherlands Administration all traffic specifically routed via Mackay, as well as all AC&R traffic to The Netherlands

[7] The order has been in effect pending appeal in the court below and review by this Court. A stay of the order was denied by the court below on March 29, 1951, and Mackay has been serving Portugal since March 12, 1951, and The Netherlands since June 19, 1951.

except that destined to Rotterdam or specifically routed via Commercial, would be handled on the Mackay circuit. The contract requires that at least 50% of all traffic within the control of AC&R be transmitted over Mackay's circuit. It is estimated that 50% of Commercial's traffic to The Netherlands will thus be diverted to Mackay.* In return, The Netherlands Administration will transmit to Mackay a proportion of its traffic destined to the United States equal to Mackay's proportion of the total eastbound traffic sent to The Netherlands by all United States radio carriers. At the same time Commercial and Western Union will operate offices in Rotterdam and Amsterdam, respectively, which will continue to solicit cable traffic in competition with The Netherlands Administration. (R. 569–70, 577–8, 613.)

Mackay's arrangements with Portugese Marconi, its foreign correspondent in Portugal, concerning division of tolls and for accounting and settlements will be the same as those of RCAC with the same correspondent. The Mackay circuit to Portugal will be used for all AC&R traffic to that country not specifically routed via Commercial. Portuguese Marconi will transmit to Mackay a proportion of the westbound traffic available to it equal to Mackay's proportion of

* Mackay and Commercial are operated as parts of an integrated cable and radio system without any substantial competition between them for traffic outbound from the United States (R. 566, 609).

the total traffic transmitted to Portuguese Marconi from the United States. No United States cable carrier maintains offices in Portugal. (R. 581, 590–1, 622.)

In terms of the number of carriers in competition with each other, competition between cable carriers and radio carriers as well as competition between radio carriers will increase in the case of The Netherlands. In the case of Portugal, the situation numerically will remain unchanged.[10]

[10] The following table summarizes the information appearing at R. 612–13:

THE NETHERLANDS

BEFORE GRANTS	AFTER GRANTS
Western Union (C) v. Commercial (C).	Mackay (R) v. RCAC (R).
Western Union (C) v. RCAC (R).	Mackay (R) v. Western Union (C).
Commercial (C) v. RCAC (R).	RCAC (R) v. Western Union (C).
	Commercial (C) v. Western Union (C).
	Commercial (C) v. RCAC (R).

PORTUGAL

BEFORE GRANTS	AFTER GRANTS
Western Union (C) v. Commercial (C).	Western Union (C) v. Commercial (C).
Western Union (C) v. RCAC (R).	Western Union (C) v. RCAC (R).
Commercial (C) v. RCAC (R).	Commercial (C) v. RCAC (R).
Mackay (R) v. RCAC (R).	Mackay (R) v. RCAC (R).
Mackay (R) v. Western Union (C).	Mackay (R) v. Western Union (C).

C = cable carrier. R = radiotelegraph carrier.

The reason for the increase in the number of competing carriers to The Netherlands is that by virtue of these authorizations Mackay, a radio carrier, will come into competition not only with RCAC, but also with Western Union. As for Portugal, Mackay already handles traffic to that country by indirect circuit via Lima, Peru, so that no change in the number of carriers results from the grants herein. (R. 612–13.)

The following tables show the share of traffic inbound to the United States and outbound to the points at issue handled by the cable carriers and the radio carriers in 1947:

The Netherlands

Cable		Radio	
Inbound	Outbound	Inbound*	Outbound
47%	70%	53%	30%

* The Netherlands Administration has no proprietary interest in the operation of United States cable carriers and receives relatively little financial return from traffic handled by them. The Netherlands Administration is interested in developing traffic for its own radiotelegraph circuits, so that the cable carriers receive only that traffic which is specifically routed over their lines. This traffic must generally be secured through solicitation by the cable carriers themselves. In the past, therefore, RCAC received the benefits of the solicitation carried on by The Netherlands authorities, since it received all traffic available to The Netherlands Administration not specifically routed over cable by the sender. (R. 580-1, 606, 620.)

Of the total traffic, Western Union handled 30% inbound and 47% outbound, Commercial handled 17% inbound and 23% outbound, and RCAC accounted for all of the radio traffic. During the entire period from 1937 to 1947 cable carriers handled 56.8% of the total traffic with The Netherlands while RCAC handled 43.2% (R. 570–1, 612).

Portugal

Cable		Radio	
Inbound	Outbound	Inbound*	Outbound
16.4%	42.8%	83.6%	57.2%

* Both United States cable carriers receive cable traffic from that country from a British cable company which does have offices for the solicitation of traffic in Portugal (R. 581-3, 592, 595-6). RCAC receives the benefit of the solicitation of traffic in Portugal by Portuguese Marconi (R. 595-6, 606, 620).

Of the total traffic, Western Union handled 13.9% inbound and 36.3% outbound, and Commercial handled 2.5% inbound and 6.5% outbound; RCAC handled 80.7% inbound and 51.4% outbound, and Mackay handled 2.9% inbound and 5.8% outbound. During the entire period from 1936 to 1947 cable carriers handled 45.3% and radio carriers 54.7% of the total industry volume. R. 584–5, 612.)

b. *Volume of Traffic.*—During 1947 traffic between the United States and The Netherlands accounted for over 13 million words and over $750,000 in revenue. The Netherlands during the first half of 1947 accounted for more traffic than each of 15 other countries to which duplicate direct radiotelegraph circuits had been authorized. RCAC and Mackay compete by means of direct circuits to 11 of those countries. (R. 570–1.) Traffic between the United States and Portugal in 1947 accounted for over 5 million words and over $170,000 in revenue. During the first half of 1947 Portugal accounted for more traffic than 9 other countries to which duplicate direct radio-

telegraph circuits had been authorized. RCAC and Mackay compete by means of direct circuits to 7 of those countries (R. 584–5).

A comparison of the traffic exchanged between the United States and the points in issue in 1936 and in 1947 shows that the volume of traffic has increased to such an extent that there is now more traffic available per carrier for the carriers serving those points with the addition of Mackay than there was in 1936 per carrier for the carriers then serving those points (R. 619). This information is summarized in the following table:

	Total words	Number of carriers	Words per carrier	Per cent increase
Portugal				
1936	572,850	3	157,613	
1947	5,422,221	*1	1,355,555	*860.0
Netherlands				
1936	9,175,244	3	3,058,415	
1947	13,593,643	*4	3,398,911	11.1

* Assumes that both Mackay and Commercial will continue to serve the point.
b A typographical error in the Commission's decision displaced the decimal point in this figure.

c. *Economic Effects of Grants*—The AC&R system would benefit financially from grants of the applications at issue, even if it be assumed that Mackay's revenue estimates are somewhat high (R. 579, 593–4, 607). Mackay's circuit to The Netherlands will be operated with its present transmitters and antennae. It estimates that it will incur additional annual out-of-pocket expenses for the operation of this circuit of $15,141 for two additional radio operators, depreciation

expenses, tube expenses, power expenses, new tone channels and control channels." It is estimated that Mackay will receive additional revenue from this circuit of $85,728, and that Commercial's revenue will be decreased by $69,024. The additional net revenue thus accruing annually to the AC&R system would be $1,563. (R. 578–9.)

Mackay's Portugal circuit will likewise be operated with existing transmitters and antennae. Mackay estimates that it will incur annual out-of-pocket expenses for the operation of this circuit of $5,148 for radio operators, depreciation and tone channels. Mackay will derive $45,192 gross additional annual revenue from this circuit, and Commercial's revenue will be decreased by $2,068 annually. This would leave $37,976 additional net revenue accruing annually to the AC&R system. (R. 592–4.)

The effect of the Mackay proposals on RCAC depends upon the extent to which Mackay diverts traffic from RCAC. Such diversion would reduce the revenues of RCAC but would not substantially reduce its expenses (R. 607). If Mackay's circuit to The Netherlands were not in operation, RCAC, by its own estimate, would realize for a six-month period a net operating revenue of $41,221 from its circuit to that country. Using RCAC's estimate of the amount of traffic which would be

[11] These figures are for the direct circuit. If operation were via Tangier, Mackay's additional annual out-of-pocket expenses would be $6,200 (R. 578).

diverted from RCAC by Mackay,[12] the effect of this diversion, using the same method for computing the costs of the circuit as RCAC used in computing its probable net revenue, would be to reduce RCAC's net revenue from this circuit to $20,326. (R. 579–80.)

As for Portugal, if Mackay's circuit were not in operation, RCAC would realize for a six-month period a net operating revenue of $15,105 from its circuit to that country. On the same basis as the computation for The Netherlands, the operation of Mackay's circuit would result in the reduction of RCAC's net operating revenue from the Portugal circuit to $1,040. (R. 594.)

During the period from 1936 to 1946 Mackay's operations grew from 17 direct circuit points to 30 direct circuit points, and the annual word volume it handled increased from about 7 million to 74 million words. During the same years the RCAC word volume increased from about 56 million words to about 232 million words. During all of these years RCAC had a substantial operating income. (R. 581; see also R. 615.)

d. *Quality of Service.*—With respect to both The Netherlands and Portugal circuits Mackay proposed to offer the standard classifications of service at the rates currently in effect by all carriers (R. 572, 590).

[12] The Commission found that the diversion would be substantially lower than this estimate (R. 579–80).

Mackay's circuit to The Netherlands will be a direct circuit utilizing a type of equipment which is used over circuits with other countries with satisfactory results. RCAC's Netherlands circuit utilizes a different type of equipment, which is preferred by The Netherlands Administration. The Netherlands Administration, however, will work with Mackay with the equipment presently used by it. Mackay would be willing to use the type of equipment employed by RCAC if appropriate arrangements could be made with the holder of the patent rights. (R. 574.) Mackay's direct service to The Netherlands will provide faster and more accurate service than that provided by Commercial, which utilizes manual relays (R. 576).

Mackay's Portugal circuit will be operated by Morse code until changed over to printer operation. Mackay operated by Morse to Portugal during the period in which it had a special temporary authorization to operate with that country. Portugese Marconi at that time advised Mackay that it would operate only on the ordinary Morse basis, but that it expected in the future to printerize the circuit. RCAC likewise operates its Portugal circuit by Morse. Mackay's Portugal circuit will be "forked" with its circuit to Madrid. This means that Mackay will utilize the same transmitter to send messages to both countries.[13] The

[13] Mackay is willing to supply printer equipment to its Spanish correspondent at any time that Portugal is ready to commence printer operation (R. 590).

westbound circuit will also be forked, the Portugese correspondent using one transmitter both for traffic addressed to Mackay and traffic addressed to RCAC. The practice of forking is generally followed by radio carriers in instances where in their judgment separate independent channels of communication are not warranted. Mackay's direct radio circuit to Portugal will provide faster and more accurate service than that provided by cable, which involves manual relays, and faster and more accurate service than that rendered by Mackay via Lima which also involves manual relays. (R. 583, 586–8, 596.)

DECISION OF THE COMMISSION

Hearings in this case were held before a single Commissioner over a period of two months in 1948 (R. 554). An initial decision was filed by the Commissioner who heard the evidence; exceptions to this decision were filed and oral argument was heard by the Commission *en banc* (R. 554–5). The final decision of the Commission,[14] including the rulings on exceptions, occupies 88 pages of the printed record (R. 550–638). The decision contains an extended factual discussion, a review of the history of radiotelegraph licensing policy and practices, an analysis of the contentions of the parties, a statement of the standards by which the Commission is guided in this field, and detailed conclusions with respect to the ap-

[14] Two Commissioners dissented (R. 639).

plication of those standards to the issues of this case. The ultimate conclusion reached by the Commission was that the public interest, convenience and necessity would be served by grant of the Mackay applications to communicate with The Netherlands and Portugal. (R. 631.)[15]

Much of the Commission's decision is devoted to a study of the broad policy question as to whether competition between direct radiotelegraph circuits[16] should be authorized, and if so, under what circumstances. RCAC in effect contended that a duplicate service may be authorized only if the applicant establishes that the proposed service will benefit the public in some immediate tangible fashion—such as by fulfilling some specific need not being met by the existing carrier, or by furnishing better or cheaper service. (R. 567–8, 616–7.) Mackay in effect contended that implementation of the national policy in favor of competition requires authorization of duplicate

[15] The Commission reached the opposite conclusion with reference to Mackay's application to communicate with Surinam (R. 630).

[16] In many situations a carrier which is not authorized to serve points by direct circuit will serve them indirectly via some other point or points. Thus, for example, Mackay has for some time provided United States to Portugal service via Lima, Peru (R. 583). At the time of hearing in this case some six percent of outbound United States-Portugal traffic and three percent of inbound Portugal-United States traffic were handled over this route (R. 612). The Commission found that indirect circuits do not furnish effective competition to direct circuits (R. 626).

circuits in all cases (R. 566–7, 617–8). The Commission adopted neither of these views.

The Commission took the position that the public interest, convenience and necessity are served by the inauguration of competition—always provided that no destructive adverse effect upon the ability of existing carriers to serve the public efficiently may reasonably be expected to result from the new competition. In light of the provisions of the Communications Act pertaining to competition, the relevant legislative history and judicial precedents, and its own past policies,[17]

[17] The Commission reviewed the history of its licensing policy with respect to competition in this field (R. 559–64, 618–9, 620–2, 624–5, 627). In the early period of the international radio industry the Commission had in effect followed a single circuit policy under which direct service between any two points was authorized to be conducted only by one carrier (R. 561, 627). See *Mackay Radio and Telegraph Co.*, 2 F. C. C. 592 (1936) (the "Oslo" case). The Commission listed a number of factors which, in the present case, led it to a different conclusion. Among other things, it noted the enormous growth of radiotelegraph traffic, and that radiotelegraph has shifted from a position of subordination to a position of dominance in the competitive struggle with cable, partly because of the financial interest in and consequent preference for radiotelegraph manifested by foreign communications administrations. The Commission pointed out that whereas in 1936 the cable carriers handled over 70% of United States total international telegraph traffic, in 1946 the cable carriers handled less than 47% of such traffic. The decision points out that the Commission has not in fact consistently followed a single circuit policy during the years intervening since the *Oslo* decision. Thus a considerable number of duplicating circuits have been authorized both during and since World War II. While some of these au-

the Commission found that the national policy favoring competition must be taken into consideration. This is true even in the formulation of licensing policies in fields in which the statutory scheme or economic situation precludes a system of uncontrolled free competition. (R. 616–25.) Moreover, the Commission declined to undertake a comparative consideration between RCAC's service and the proposed Mackay service.[18] It was of the view that a proposed new service must be adequate, but that it need not be superior to an existing service to warrant authorization. (R. 576–7, 588, 605.) The Commission explicitly recognized, however, that a competing service should not be authorized where the effect would be degradation of the service of an existing carrier which had been rendering satisfactory service (R. 588).

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thorizations were to be explained by the national policies adopted by other government agencies during the war, the Commission stressed that a number of the duplicating authorizations did not fall into that category. (R. 618–30.)

[18] It specifically found, however, that existing service to the points in issue was neither inadequate nor inefficient; nor did Mackay propose cheaper or better service than that being offered by RCAC. On the contrary, the capacity of existing telegraph facilities between the United States and the points involved was in excess of that required to handle present and expected traffic. (R. 604.) Mackay did not propose speedier or more comprehensive service than that available from RCAC (R. 605), but Mackay's proposed service was superior to its own indirect radio service and to the cable service then being furnished by Commercial (R. 605–6). The rates proposed by Mackay were identical with those currently in effect for all carriers (R. 572, 590).

The Commission concludes that "in those instances where there is only one direct radiotelegraph circuit to a point, we should authorize a second competing radiotelegraph circuit where the applicant demonstrates that such competition is reasonably feasible" in the sense that the traffic would support a competing circuit, and that the ability of existing carriers to render adequate service would not be impaired (R. 628).

Applying its standard of reasonable feasibility to the applications before it, the Commission concluded that duplicating services to Portugal and The Netherlands were amply warranted. The Commission found that Mackay was a qualified applicant and that its proposed services were satisfactory. And it found that overall competition for telegraph traffic (*i. e.*, in both radio and cable) would be increased. (R. 606.) On the basis of the best estimates which could be made as to future traffic conditions, the Commission concluded that RCAC could reasonably be expected to be able to continue to operate radiotelegraph service both to Portugal and The Netherlands at a profit despite having to face Mackay's competition (R. 579, 594). It found that RCAC's overall ability to provide radiotelegraph service would not be impaired, and it concluded that the added costs which might result on an industry-wide basis would be relatively small, so that the impact on the rate structure as a whole should not be substantial (R. 607). The

Commission rejected the contention that competition would give an undue opportunity for foreign administrations to play one American carrier against another. The Commission pointed out that Mackay's proposed operations were to be conducted on the same terms as those of RCAC (R. 572, 590, 622), and that the Commission has authority to prevent detrimental practices by American carriers. (R. 622–3.)[19]

The Commission gave particular attention to the effects of the proposed authorizations upon competition between cable and radiotelegraph services in the light of the prohibitions of Section 314 of the Communications Act against common ownership, control or operation of international cable and radiotelegraph where the purpose of, or effect may be to substantially lessen competition, restrain commerce or create a monopoly. (R. 607–15).[20] With respect to the

[19] Each carrier is required to report to the Commission periodically with respect to all negotiations such carrier is carrying on with its foreign correspondents and to file copies of its contracts with them (R. 622).

[20] After the close of the hearing in the instant proceeding, but prior to the rendition of any decision, the Commission held a separate proceeding, *Matter of the American Cable and Radio Corporation, etc., applicability of Section 314 of the Communications Act, as amended*, F. C. C. Docket No. 9093 (hereinafter referred to as Docket 9093), in order to ascertain whether Section 314 is applicable to the AC&R system companies, and if so, whether these companies were then in violation of that section. The decision in that proceeding was adopted prior to the decision herein. Respond-

cable-radio question the Commission concluded that there would be some diversion of traffic from Commercial to Mackay, and thus elimination of some cable business. But it found that there would continue to be intense competition between cable and radio. (R. 609.) Prior to the present authorizations there was radio-cable competition between Commercial and Western Union on the one hand and RCAC on the other.[21] As a result of the new authorizations to Mackay, there would now be radio-cable competition between Mackay and Western Union, a cable carrier which handles a substantial share of the telegraph business with the points here involved. (R. 612–3.) Moreover, as has been stated above, the Commission

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ent participated fully in Docket 9093, presenting exhibits, proposed findings and briefs.

The Commission in its present decision referred to and adopted its findings and conclusions in Docket 9093 as to the lawfulness of the AC&R system generally under Section 314 (R. 608–9). It was therein determined that Section 314 is applicable to Mackay and the AC&R system, but that the existing ownership, control and operation of cable and radio companies within the AC&R system did not constitute or result in a violation of that section. In its decision in the instant case the Commission additionally considered and evaluated in light of Section 314 the probable effects of the Mackay proposals here at issue.

[21] In the case of Portugal, to which Mackay did handle traffic by indirect circuit prior to the hearing, there was radio-cable competition between Western Union and Mackay (*supra*, pp. 10–11). There has been no substantial competition between Mackay and Commercial for outbound traffic from the United States since both are owned by AC&R (R. 566, 606–7, 609, 613–4; see *supra*, pp. 3–4, 9).

concluded that overall competition for telegr traffic would be increased by the new author tions (R. 606–7).

In sum, the Commission concluded that proposed services would provide the first effec radiotelegraph competition to the points involv that they would not substantially affect the ov all rate structure, that they would not imp the ability of existing carriers to perform th present functions, and that there would be substantial diminution of radio-cable competiti Accordingly, it found that the standard of r sonable feasibility had been satisfied, and gran the authorizations.[22]

DECISION OF THE COURT OF APPEALS

The court below reversed the decision of Commission to authorize direct radiotelegra service by Mackay to Portugal and The Neth lands. It held that although competition by M kay with RCAC in handling this traffic was r sonably feasible, the Commission did not ha the authority to authorize a duplicate, dir radiotelegraph circuit in the absence of a sho ing that such authorization will produce "bet service or lower rates or any other public benef (R. 701). Having reached this conclusion, t

[22] As has been observed, the Commission reached the c trary conclusion with respect to Surinam. While the Su nam application is not in issue here, the Commission's d cussion of that question illuminates the standards appl throughout its decision. See R. 596–604, 630.

court found it unnecessary to pass upon the correctness of the Commission's conclusion that the proposed authorizations would not involve violation of Section 314 of the Communications Act (R. 702).

Judge Prettyman, dissenting, characterized the central issue on which the majority had ruled as "whether the Commission can authorize a competing service as a matter of policy where one is not actually needed * * *" (R. 703). He concluded that this issue must be resolved in the affirmative. Since the Commission's findings, which were supported by the record, showed that the competition of Mackay would not imperil the financial stability of RCAC, he concluded that there was ample support for the exercise of the Commission's judgment that the presence of Mackay in the field will serve the public interest. (R. 703–7.) The dissenting judge also analyzed the Section 314 question. He agreed with the determination of the Commission that the new services authorized to be rendered by Mackay would not have any of the adverse effects upon competition contemplated by Section 314 (R. 705–7).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred—

(1) In holding that the Commission does not have discretion to authorize a competing direct radiotelegraph circuit to a given point where com-

petition is reasonably feasible unless it is proved that ascertainable specific public benefit will be derived from such service.

(2) In holding that where an applicant for authority to operate a competing direct radiotelegraph circuit does not propose lower rates or speedier or more efficient service than that already being rendered, the Commission's conclusion that long-term salutary effects may be expected to be derived from competition between carriers cannot be sustained.

(3) In reversing the decision of the Commission granting the applications of Mackay to communicate with Portugal and The Netherlands.

SUMMARY OF ARGUMENT

I

The decision of the Commission to authorize Mackay to communicate with The Netherlands and Portugal rests upon a licensing policy which is both lawful and reasonable. The Commission properly declined to adopt a policy of authorizing free competition in the radiotelegraph industry. At the same time it properly concluded that, in determining whether it is in the public interest, convenience and necessity to authorize a duplicating direct circuit, competition should be considered desirable if reasonably feasible. *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35. Under this standard as defined and applied by the Commission, the institution of satisfactory

competing direct radiotelegraph service by a qualified applicant is deemed to be in the public interest where the traffic will support two such services, and where the effect of the competition will not be destructive of the ability of existing carriers to serve the points involved, or to render efficient service generally. This standard properly takes into account the national policy in favor of competition which is reflected in the antitrust laws and in the Communications Act. *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

II

The conclusion of the Commission that competition between direct radiotelegraph circuits to The Netherlands and Portugal is reasonably feasible is fully supported by the record and the Commission's findings thereon. The Commission's detailed findings with respect to the character of service proposed, traffic conditions involved, the probable effects upon the ability of other carriers to continue to render efficient service, and possible adverse effects resulting from competition, amply support its ultimate conclusions. The findings of the Commission that no immediate specific benefits in terms of improved rates or services were proposed in the subject applications plainly do not negate its over-all judgment that competition would in the long run prove beneficial. If there is any lack of precision and definiteness in the manner in which the ex-

pected benefits of competition have been spelled out in the Commission's decision, it arises from the imponderables involved and the impossibility of detailed predictions. The authorizations to Mackay to communicate with The Netherlands and Portugal were a valid exercise of the Commission's discretion and should be sustained.

ARGUMENT

The legal issue presented by the petition for writ of certiorari is clear-cut. The Commission's decision stands for the proposition that competition in international direct radio circuits is desirable where "reasonably feasible." If the traffic will support a second carrier and the ability of the existing carrier to serve the points involved and to provide radiotelegraph service generally will not be impaired, the Commission believes that a duplicate circuit operated by a qualified carrier will serve the public interest, convenience and necessity. In the present case the Commission's findings, fully supported by the record, establish that the proposals by Mackay to communicate with The Netherlands and Portugal meet this test.

The majority of the court below did not challenge the Commission's findings. Accepting those findings, and accepting the ultimate conclusion that competition in the circumstances here is reasonably feasible, the court reversed the Commission's decision on the theory that the Commis-

sion had applied an improper standard. In the court's view the standard of public interest, convenience and necessity requires that a competitive service proposal be denied unless it is demonstrated that it will produce better service or lower rates or some other specific, ascertainable benefit.

The difference in approach between the court below and the Commission is a fundamental one. The Commission's policy is rested on the premise that the national policy in favor of competition is applicable in the radiotelegraph field to the extent that the usual advantages produced by competition are to be weighed against any evils which reasonably may be anticipated to flow from it in the particular circumstances. The court below has ruled that such a policy is beyond the power of the Commission. The court's decision does not represent a discretionary policy determination by the court, for authority to make such determinations in this field has been vested in the Commission alone; it is posited as a rigid rule of law barring the entry of a new competitor unless specific public benefits can be described in advance. We believe that this rule of law cannot be sustained either as an interpretation of the relevant provisions of the Communications Act, or as a principle of general administrative law.

We submit that the rule of law which should be applied in this case was concisely and accurately stated by Judge Prettyman, dissenting, in the court below (R. 702):

> I think that, when existing traffic permits more than one carrier, and where the existence of a second carrier would not endanger the stability or the service of the existing carrier, competitive service may well be in the public interest. If that be so, then, where the necessary conditions are established, the question whether there should or should not be a second carrier is for the Commission to decide.

We propose to show that the tests laid down by Judge Prettyman have been met here, and that the Commission reasonably exercised the discretion vested in it.

I

COMPETITION IN INTERNATIONAL RADIOTELEGRAPH SERVICES MAY BE AUTHORIZED WHERE THE COMMISSION FINDS THAT IT IS REASONABLY FEASIBLE

The Communications Act of 1934, as amended, brings common carriage by international radiotelegraph under the jurisdiction of the Commission (Section 2, 47 U. S. C. 152) and only those carriers which are licensed by the Commission may conduct such business (Section 301, 47 U. S. C. 301). The statutory standard which governs the Commission in licensing is the familiar "public interest, convenience, or necessity" (Section 309 (a), 47 U. S. C. 309 (a)). This standard has acquired general content and meaning through a long series of judicial interpretations of the many statutes in which it is found. In addition,

in each statute in which the term appears it acquires a special meaning and content in light of the particular statutory context and purposes.

It is settled law that the public interest embraces national policies reflected in general legislation and judicial decision. *McLean Trucking Co.* v. *United States*, 321 U. S. 67.[23] Thus, the national policy in favor of competition which is reflected in the antitrust laws becomes a part of any statute which sets forth a public interest standard. By the same token, competition becomes a factor to be weighed with other factors in the exercise by an administrative agency of its licensing functions.

Competition in itself has long been considered as a desirable objective in the licensing proceedings of agencies which are entrusted with the regulation of common carriers under the public convenience or necessity standard. And such consideration has repeatedly received judicial sanction. In the *McLean Trucking* case, this Court

[23] In that case it was held that the Interstate Commerce Commission must consider the national policy in favor of competition even when acting under a statutory provision providing in certain cases for the merger of motor carriers (49 U. S. C. 5 (2)-(b)). The Commission there approved such a merger, and in upholding the Commission's conclusion that on the facts of the particular case the benefits of the particular competition to be eliminated were outweighed by other considerations, the Court pointed out that the "complex task" of resolving opposing considerations of this character is a matter primarily for the administrative agency (321 U. S. at 87).

made it plain that, in applying the "public interest" criteria in Section 5 (2) (b) of the Interstate Commerce Act, it was proper, if not necessary, for the Commission to take into consideration the policy in favor of competition embodied in the antitrust laws. In rejecting the contention that antitrust policies were controlling or decisive, the Court recognized "that the preservation of competition * * * was a desideratum" (*id.* at 84, n. 20); that Congress has neither "made the antitrust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing upon a proposed merger to ignore their policy." (*id.* at 86); that "the preservation of independent and competing motor carriers unquestionably has bearing on the achievement" of the national transportation policy; and that the Commission must "consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy" (*id.* at 87).

The *McLean* case, it is true, was concerned with the meaning of public interest as a guide to the Interstate Commerce Commission in authorizing a consolidation, and not with a certificate of convenience or necessity. But the *McLean* opinion (321 U. S. at p. 85, n. 24) cites with approval *Chesapeake & Ohio Ry. Co. v. United States*, 283 U. S. 35, which arose under Section 1 (20), requiring the issuance of certificates of public

convenience and necessity for extensions of railroad lines and thus comparable to the statutory provision here involved. In that case, the Virginian Railway was building an extension to connect with the Chesapeake & Ohio in a manner which would enable the Virginian's westbound coal traffic to proceed by a more economical route. The Norfolk & Western sought permission to build a new 10½-mile connecting line to reach the Virginian's new line. The Norfolk & Western had previously competed with the Chesapeake & Ohio for the Virginian's westbound traffic, and the proposed new line would enable it to continue to do so more effectively, though not quite as economically as the Virginian-Chesapeake & Ohio operation. The Chesapeake & Ohio objected to the Commission's approval of the Norfolk & Western addition on the ground that "under the Transportation Act the Commission may not authorize new construction for the purpose of continuing such competition" (283 U. S. at 41). The Court rejected this contention in summary fashion, stating (p. 42):

> * * * In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. * * *

And the Court noted further that the "Commission has recognized the advantages of competitive service to shippers * * *" (*ibid.*).

The *Chesapeake & Ohio* case demonstrates that it is proper for an agency, passing upon applications for certificates of convenience and necessity for the construction of new facilities, to take the desirability of competition into account as a factor.

The Court again noted the significance of competition in the granting of certificates in *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 532, when it approved the Interstate Commerce Commission's action on the assumption that the Commission "could not have been oblivious to the competitive consequences of its order or the relation of those consequences to the public interest", and that the Commission must have "inescapably had in mind" the competitive factors in taking the action. And this Court's opinion went on to state (*ibid.*, n. 20) that, "The Commission has recognized the value of reasonable competition, cf. *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *Inland Motor Freight* v. *United States*, 36 F. Supp. 885; 44 M. C. C. 535, 548, in no case perhaps more clearly than in those presented on this appeal." See also *Union Pac. R. Co.* v. *Denver & Rio Grande Western R. Co.*, 198 F. 2d 854, 858 (C. A. 10).

The Civil Aeronautics Board has also considered the maintenance or creation of competi-

tion among air carriers as an important factor in licensing determinations pursuant to the Civil Aeronautics Act of 1938 (49 U. S. C. 401, *et seq.*). In *American Export Airlines, Inc.—Trans-Atlantic Service*, 2 C. A. B. 16 (1940), affirmed as to the issue here discussed, *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (C. A. 2), the Board made a statement which is apposite here (2 C. A. B. at 32):[24]

> Thus, economic regulation alone may not be relied on to take the place of the stimulus which competition provides to the advancement of technique and service in air transportation. Competition invites comparisons as to equipment, costs, personnel, methods of operation, solicitation of traffic, and the like, all of which tend to assure the development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States * * *. Although it does not appear that the quality of service rendered by intervener [Pan American] is at present inadequate in any respect, the record indicates that benefits to the public, in the shape of improved service resulting from advances in

[24] See also the report of the Board dated November 24, 1952, on "The Role of Competition in Commercial Air Transportation" to the Subcommittee on Monopoly of the Select Committee on Small Business, United States Senate, 82nd cong., 2nd Sess., Subcommittee Print No. 9.

> the industry, would be accelerated by competition between United States air carriers on the North Atlantic route.

The national policy in favor of competition does not require a regulatory agency to foster competition willy nilly; it is a truism that "competition between carriers may result in harm to the public as well as in benefit." *McLean Trucking Co.* v. *United States, supra*, at 83–84. Nor is the policy of competition to be given overriding effect without regard to the statutory purposes and the statutory provisions governing conduct of a particular agency. As the *McLean* case, *supra*, makes clear, in weighing policies embedded in other statutes an agency must look to the policy of the statute it is applying. "The precise adjustments * * * will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement" of the particular statute the agency is administering (321 U. S. at 80).

The cases which we have just discussed demonstrate that under the Interstate Commerce Act and the Civil Aeronautics Act, the concept of public interest, convenience and necessity, permits, if it does not require, the regulatory agency to take into account the advantages of competition. No one has suggested that the licensing provisions of the Communications Act give the Federal Communications Commission less au-

thority in this respect than the Interstate Commerce Commission.[25] On the contrary the statute which the Federal Communications Commission is administering leaves no doubt of the intention of Congress to maintain competition in the radio communications field.

All radio communications over which the Commission has jurisdiction, specifically including foreign radio communications, are made subject by Section 313 of the Communications Act (47 U. S. C. 313) to the antitrust laws of the United States. That section provides:

> All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. * * *

[25] The court below stated that legislative history suggests that the Communications Act "was intended to apply the same principles as the Interstate Commerce Act," citing S. Rep. 781, 73d Cong., 2d Sess. (R. 701). This generalization must be qualified in light of the statutory differences, as well as the specific legislative history reviewed at pp. 37–43. Thus the Interstate Commerce Commission is empowered to approve mergers in some instances as the *McLean* case, *supra*, illustrates. As is pointed out, *infra*, p. 51, Congress has consistently refused to authorize the Commission to approve mergers of international telegraph carriers, although legislation authorizing merger of domestic carriers was enacted.

Section 602 (d) of the Act (15 U. S. C. 21) provides for Commission action enforcing compliance with the provisions of the Clayton Act (38 Stat. 730 *et seq.*, as amended, 15 U. S. C. 12 *et seq.*) by common carriers subject to its jurisdiction. And Section 314 of the Communications Act (47 U. S. C. 314) manifest intense Congressional concern with effective competition by forbidding common ownership, control or operation of radio and cable in international communication where the effect may be to substantially lessen competition, restrain commerce or unlawfully to create monopoly.

Examination of the origins of the Communications Act of 1934 establishes that Congress intended Sections 313 and 314 to prevent the monopolization of international telegraph communication and of international radiotelegraph communication. Sections 313 and 314 of the Communications Act were taken almost verbatim from Sections 15 and 17, respectively, of the Radio Act of 1927 (44 Stat. 1162, *et seq.*). Prior to the adoption of the Radio Act a bill was introduced which contained antitrust provisions virtually identical with Section 313.[26] A vice president of Radio Corporation of America (parent of respondent) testified in a hearing on this bill that in international communication competition should be between cable and radi

[26] H. R. 7357, 68th Cong., 1st Sess. (1924), Section 2G.

rather than between radio companies.[27] Nevertheless, language substantially the same as that of Section 313 was subsequently introduced in other bills[28] and was ultimately enacted in the Radio Act. During the debate by the Senate on the bill which became the Radio Act the following colloquy took place (67 Cong. Rec. 12352):

> Mr. KING. Then, this bill is directed toward preventing a monopoly in the radio business?
>
> Mr. DILL. Yes, so far as possible * * * We do not believe there is any possibility of monopoly under the proposed legislation, for every safeguard has been placed around it which we thought could be placed around it without hampering the industry.

[27] Hearings before the Committee on the Merchant Marine and Fisheries of the House of Representatives, 68th Cong., 1st Sess., on H. R. 7357, p. 169, 173. This witness testified (p. 169): "* * * The sole test, as I see it, in the matter of international communication, is the test of competition between cables and radio, but not within radio itself; because there you have a natural monopoly for the time being, and if you divide that natural monopoly in the United States, so far as international communication is concerned, as distinguished from broadcasting and sales, then you merely transfer leadership in this modern means of communication to the foreign countries of the world instead of preserving it for our own country."

[28] S. 2930, 68th Cong., 1st Sess. (1924); H. R. 5589, 69th Cong., 1st Sess. (1925); S. 3968, 69th Cong., 1st Sess. (1926); S. 4156, 69th Cong., 1st Sess. (1926); H. R. 9108, 69th Cong., 1st Sess. (1925); H. R. 9971, 69th Cong., 1st Sess. (1926). H. R. 9971 ultimately became the Radio Act of 1927.

The Federal Radio Commission, which was set up pursuant to the Radio Act of 1927 adopted as its policy in the licensing of international radiotelegraph communciation facilities:

> That competitive service be established where there are competing applications, or an application or applications to compete with already established service, and that in the grant of competing license fairness of competition must be established, except that as to an isolated country, which, in the judgment of the commission, will not afford sufficient business for competing wireless lines, only one grant of license shall be made, preferably the first application in priority.[29]

During the period between 1928 and the enactment of the Communications Act of 1934 several bills concerning communications were considered by the Congress.[30] In the hearings and debates on these bills Congress was urged by one group of witnesses to eliminate the antimonopoly provisions of the Radio Act, and by another group, to continue them.[31]

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[29] Second Annual Report of the Federal Radio Commission to the Congress, for the year ended June 30, 1928, p. 30.

[30] H. R. 8825, 70th Cong., 1st Sess. (1928); S. 6, 71st Cong., 1st Sess. (1929); H. R. 5716, 71st Cong., 2d Sess. (1929); S. 2910, 73d Cong., 2d Sess. (1934); S. 3285, 73d Cong., 2d Sess. (1934); H. R. 8301, 73d Cong., 2d Sess. (1934).

[31] Arguments in favor of abolishing the antimonopoly provisions of the Radio Act appear at: Hearings before the Senate Committee on Interstate Commerce, 71st Cong., 1st Sess. on S. 6, pages 258, 261, 324, 325, 1088–91, 1142–4, 1180–2,

A bill considered by the Congress in 1932 contained severe restrictions on the employment of alien officers and directors by American communications corporations. At the hearings on this bill Senator White expressed concern lest too rigid enforcement of this provision might deprive International Telephone and Telegraph Co. (which controls AC&R) of the licenses of its subsidiaries in the international communications field and would thereby create a monopoly of international radio communications.[32] The

1197–8, 1201–2, 1234–6, 1243–7, 1281–2, 1317, 1326–7, 1333, 1450–1, 1529, 1669–91; 2295–8; Hearings before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. on S. 2910, pages 132–5; Hearings before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. on H. R. 8301, pages 103, 207–8.

Arguments in favor of maintaining the antimonopoly provisions of the Radio Act appeared at: Hearings before the Senate Committee on Interstate Commerce, 71st Cong., 1st Sess., on S. 6, pages 882–3, 1459–62, 1468, 1472, 1482, 1502, 1520, 1527–8, 1531, 1542–4, 1547, 1552–4, 1559, 1561, 1919–20; Hearings before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. on H. R. 8301, pages 263, 266–72.

[32] Hearings before Senate Interstate Commerce Committee on H. R. 7716, 72nd Cong., 1st Sess., Part I, pp. 15–16. The most pertinent part of this statement is as follows: "It is significant that in the building up of this [IT&T] system they have not violated in any respect the radio law. I think it would be a grievous hardship to them, and I think of even more importance it would be a grievous harm to the communication interest of the United States as a whole, and the people of the United States if this communication company should be deprived of these facilities. I think to deprive it of the licenses of its subsidiaries would be taking the most

final version of the bill, which was passed by both houses, but pocket-vetoed, contained a much weaker alien provision.[33]

In 1933 at the direction of the President, an Interdepartmental Committee made a study of the entire communications situation. Its report stated that a majority of the Committee believed that some extension of the then existing authority for telephone companies to consolidate with the approval of the Interstate Commerce Commission should be made for all communica-

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far-reaching step toward a monopoly of radiocommunication in the international field that we could take.

"Personally I would strike that language out of the pending proposal, and I would leave existing law in this respect as it is. I do not know how far Senator Dill is in concurrence with my views, but these are my views.

"The CHAIRMAN. To what company would the monopoly go if this language were to stay in the bill?

"Senator WHITE. Well, the great competitor in the international field is the Radio Corporation of America. One of the underlying purposes of the 1927 law was to preserve competition in the communication field, and there were various efforts made to insure that there should be competition.

"I personally feel that to write this language which is here proposed into the law would be a tremendous backward step and that we would be in large measure abandoning the original conception of the United States law with respect to this matter of monopoly. We would be doing what I think is a great harm to an American communication company, and we would be very closely verging on monopolistic control over international communications."

[33] S. Rep. No. 564, 72nd Cong., 1st Sess. (1932), p. 9. See also H. Rep. No. 2106, 72nd Cong., 2nd Sess., Conference Report (1933), p. 2.

tions companies.[34] The Committee disagreed, however, as to the extent to which competition in these fields should be eliminated.[35] Nevertheless, the antimonopoly provisions of the Radio Act, including those relating specifically to radio communications, were reenacted in the Communications Act.

While the foregoing legislative history does not indicate that the field of international radiotelegraph communications was intended by the Congress to be one of free competition[36] or that the principles applicable to common carrier regulation generally are inapplicable in this field, it does show that Congress has consistently refused to adopt recommendations for legislation premised on the theory that competition in this field is undesirable. This history, together with the

[34] Study of Communications By an Interdepartmental Committee, Senate Committee Print, 73d Cong., 2nd Sess. (1934), pp. 10–11, 12, 14.

[35] *Id.*, pp. 12–13, 14. The majority, although recognizing that "under the existing unrestricted competitive system," the telegraph service of the United States was not fully adequate, doubted that monopoly "could have done as much." It did believe, however, that unrestrained competition led to "waste and strife." *Id.*, p. 11. The minority member believed that the public would best be served and that the art would reach its greatest development if Governmental policy required, and at the same time limited, competition in the telegraph communication field between that number of companies which can operate at a reasonable profit. *Id.*, p. 13.

[36] The Commission has never followed a policy of free competition in the radiotelegraph field, and its decision herein did not follow such a policy (R. 700).

explicit language of Sections 313 and 314 of the Act, makes clear that the national policy in favor of competition has been "leavened" into this statute in a marked degree. See *McLean Trucking Co.* v. *United States*, 321 U. S. at 80.

During the course of this proceeding much has been made by respondent of past decisions of the Commission, and a past decision of the court below. It is urged that these decisions, together with certain legislative history, establish that competition may not be presumed to be a desirable objective to be weighed with other considerations in making licensing determinations. We feel compelled briefly to discuss those prior decisions here because it is apparent from the opinion of the court below (R. 699–700) that it relied heavily upon them in reversing the Commission's present decision.

At the outset, it must be said that if any prior Commission or court decision may properly be construed as rejecting the desirability of competition as a proper licensing consideration, we believe that such decision is to that extent erroneous and should not be followed. But we think it clear that the prior decisions do not stand for the proposition attributed to them. To be sure, the result reached by the Commission in its present decision (1951) differs from the result reached in 1936 in a case which is similar on its particular facts. But conditions in the radiotelegraph industry have

changed drastically since 1936 and it is neither reprehensible nor surprising that the Commission's policy has also changed. Flexibility in meeting changing conditions and in reevaluating policies is one of the cardinal responsibilities of an administrative agency.

The principal prior decision upon which respondent relies is the so-called *Oslo* case.[37] In that case the Commission in 1936 denied Mackay's application for a duplicate direct radiotelegraph circuit to Oslo, Norway. Mackay urged on appeal that the Communications Act required the licensing of its competing radio circuit in order to end the monopoly by RCAC of radiotelegraph traffic to Norway. This contention was rejected by the court of appeals as a proposition of law, but the court did *not* hold that the effect of such a grant upon competition could not properly be considered by the Commission.[38] The *Oslo* decision

[37] *Mackay Radio and Telegraph Co.*, 2 F. C. C. 592, affirmed *sub nom. Mackay Radio & Telegraph Co.* v. *Federal Communications Commission*, 97 F. 2d 641 (C. A. D. C.).

[38] On the contrary, the court of appeals commented as follows upon Mackay's contention that the grant of its application would certainly serve the public interest, convenience or necessity because of its effect upon competition (97 F. 2d at 644-5):

"* * * As a proposition of fact, it rests logically upon some three premises, express or implied: First that there is today less competition than the interests of the public require; second that the licensing of appellant would increase competition; and third that this increase would result in more benefit than harm to the public. *The evidence might perhaps have supported, but certainly did not require, a finding in*

merely affirmed the exercise of the Commission's expert judgment that on the facts there presented the inauguration of direct circuit radiotelegraph competition would not serve the public interest.

The dissenting judge below brought into sharp focus the essential difference between the proposition of law established by the court's decision in the *Oslo* case, and the issues presented here (R. 704–5):

> In the *Oslo* case, *supra*, the question was whether competition is always necessarily in the public interest. The answer was "No." I agree with that answer to that question. The question here is whether competition is ever in the public interest. The answer, it seems to me, is "Yes." The nub of the matter is the amount and nature of the available and prospective business. If the business will support two operators, *the regulatory authority has a wide discretion in determining whether to serve the public interest by drastic supervision of a single operator or to install an automatic self-regulator in the form of a competitor.* [Emphasis added.]

In 1940 the Commission passed upon Mackay's application for a direct radiotelegraph circuit to compete with that of RCAC to Rome, Italy. *Mackay Radio & Telegraph Co., Inc.*, 8 F. C. C.

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appellant's favor on any one of these three points. On each, the record contains substantial evidence to the contrary." [Emphasis added.]

11. At the time of the hearing upon which this decision was based (1937), over-all conditions in international communications were the same as those considered in the *Oslo* case. The Commission denied the application, but its decision articulated essentially the same standard of "reasonable feasibility" which is now assailed as novel (8 F. C. C. at 20):

> Traffic and revenue available for the American carriers must determine to a large extent the desirability of competition as to any foreign country. *If the traffic and revenue are sufficient to support the entry of a new carrier, and to justify additional competition, sound communication policy would usually indicate that additional competition should be fostered.* On the other hand, if there is a small amount of traffic and revenue involved, and if the needs of the public are being satisfactorily met, the entrance of additional competition into that field may adversely affect the ability of all of the companies to serve the public. It must be borne in mind that the preservation of existing facilities which are satisfactorily serving the public is of primary importance, and that to intensify a highly competitive situation, not justified by the traffic and revenue available, may be economically disastrous to the American communications system as a whole. The question is not whether added competition would benefit or harm a particular

> carrier, but rather what would be its effect upon the service to the public.
>
> The record before the Commission does not justify a finding that the applicant would be able to develop any substantial amount of new business; nor does it show that the reallocation of the existing traffic or the increased competition would confer any benefits upon the public generally unless it be assumed that the creation of additional competitive facilities, in itself, is a public benefit. [Emphasis added.]

As we have pointed out (*supra*, pp. 6–7), the action of the Commission with respect to authorizing duplicate radiotelegraph circuits has varied in accordance with circumstances prevailing during a particular period. As a consequence, passages may be found in the Commission's opinions which are not entirely harmonious on this subject. But even when the Commission was denying certificates for duplicate service, it recognized the desirability of competition when feasible, as the first paragraph quoted above indicates.

The policy in favor of competition in international communications also received Commission recognition in more recent years, but prior to the present decision. Thus, in *In re Charges for Communications Service Between the United States and Overseas and Foreign Points*, 12 F. C. C. 29, 62 (1947) it was stated:

> The national policy in international communications is that competition be main-

tained, and Congress has not approved any proposals looking toward merger of the United States international telegraph carriers.

In the *British Circuits* case, 12 F. C. C. 526 (1947), the Commission was prohibited by international agreement (Bermuda Telecommunications Agreement of 1945, 60 Stat. 1636) from implementing a policy of direct competition between carriers but within this limitation the Commission explicitly fashioned its decision "to maintain as much competition between Mackay and RCAC as is feasible" under the circumstances (12 F. C. C. at 552–3).

After the Commission had denied the application by Mackay for a duplicating circuit in the *Oslo* case, *supra*, bills were introduced in Congress which would have amended Section 313 of the Act to *require* that the Commission, in considering applications for licenses to engage in direct foreign radiotelegraph communication, "consider competition * * * to be in the public interest."[*] The Commission urged that the bills not be adopted; it regarded the bills as making competition between circuits a mandatory policy regardless of traffic conditions, the effect upon the public or the carriers involved, or other

[*] S. 3875 and H. R. 10348, 75th Cong., 3rd Sess. (1938). See discussion of this legislation by the majority of the court below, R. 700.

relevant considerations. The Chairman of the Commission stated the Commission's belief that:

> The legislation would be a departure from the policy of Congress as now disclosed by the Communications Act of 1934. The Commission has heretofore interpreted the present law as not *requiring* competition in such communication to be considered to be in the public interest, and the United States Court of Appeals for the District of Columbia in the case of *Mackay Radio & Telegraph Co.* v. *Federal Communications Commission, et al.*, No. 6970, decided April 11, 1938, — Appeals, D. C., —, has affirmed the correctness of this construction of the statute by the Commission. [Italics supplied.]
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> * * * the practical effect of the legislation would appear to be to virtually remove the quasi-judicial powers of the Commission in this regard and require the granting of such licenses or modifications of licenses in any case of the class to which the bill refers.
>
> Under the existing law where the facts would support a finding of public interest in a particular case, the Commission has the power and the duty upon making the statutory finding of public interest, convenience, and necessity to encourage or authorize competition in direct foreign radiotelegraph communication; and it has the corresponding power and duty to deny applications which would have the result

> of creating competition upon a finding on the basis of the facts in a particular case that the public interest would not be served thereby. [Hearings before a Subcommittee of the House Committee on Interstate Commerce on H. R. 10348, 75th Cong., 3rd Sess. (1938), p. 3.]

These bills died in committee.

In subsequent years, a series of bills has been introduced which would have permitted merger of domestic and international telegraph carriers.[40] A bill introduced in 1942 as a result of hearings held by the Senate Committee on Interstate and Foreign Commerce would have added a new section to the Communications Act to permit the consolidation of domestic and international carriers into two separate monopolies.[41] This bill

[40] The following lists the instances since passage of the Communications Act, and prior to the hearing herein, in which Congress has been urged to allow merger of international telegraph carriers: H. Doc. 83 (1935) embodying Recommendations of the Federal Communications Commission for amending the Act; Hearings before a subcommittee of the Senate Committee on Interstate Commerce, pursuant to S. Res. 95, 77th Congress, 1st Session (1941); S. Rep. 769, Study of Telegraph Industry, 77th Congress, 1st Session (1941); Hearings before a subcommittee of the Senate Committee on Interstate Commerce on S. 2445 and S. Rep. 1490 on S. 2598, 77th Congress, 2d Session (1942); Study of International Communications, a report on hearings held pursuant to S. Res. 187, 79th Congress, 1st Session (1945), S. Rep. 1907, 79th Congress, 2d Session (1946); and S. Rep. 19, 80th Congress, 1st Session (1947).

[41] S. 2445, 77th Cong., 2d Sess. See S. Rep. No. 769, 77th Cong., 1st Sess. (1941).

was not adopted. In 1943, however, the Congress did, as a result of the hearings on these bills, enact the present Section 222 of the Communications Act (47 U. S. C. 222), which allows the merger of *domestic* telegraph carriers but pointedly makes no provision for international merger.

It seems clear that neither the abortive bills which would have made authorization of competing circuits mandatory on the Commission, nor the abortive bills permitting the Commission to approve total elimination of competition by the merger process, furnish a reliable or even persuasive guide to the intentions of the earlier Congress which enacted the Communications Act of 1934. To the extent that this history is meaningful, however, it would seem to indicate a Congressional desire to leave the Commission free to authorize or deny competitive services depending upon whether, in all the circumstances, the Commission in its informed and reasoned discretion finds such competition to be in the public interest. For Congress has been unwilling to *force* the Commission to license competing circuits, and unwilling to *permit* it to eliminate competition by approving mergers.

Once it is conceded, as we believe it must be, that the Commission may properly consider the national policy in favor of competition as a significant factor in licensing radiotelegraph opera-

tions, the precise accommodation of this policy to the over-all problems of the industry must necessarily be left largely to the judgment of the agency clothed with authority to regulate the industry and familiar with its day-to-day problems. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535–6. Determination of the public interest, convenience and necessity in granting licenses to operate is peculiarly one for the exercise of administrative expertise. The exercise of this discretion must, of course, be made with appropriate findings based upon the record before the agency. It will be shown in Point II that in this case the Commission reasonably evaluated all relevant factors in reaching its conclusion that the public interest, convenience and necessity would be served by the grant of Mackay's Portugal and Netherlands applications.

II

THE COMMISSION REASONABLY DETERMINED THAT COMPETITION SHOULD BE PROVIDED IN DIRECT RADIOTELEGRAPH SERVICE TO THE NETHERLANDS AND PORTUGAL

The basic findings upon which the Commission's decision was premised were, with a single exception, found by the court below to be supported by the record (R. 698). And the single finding as to which the court expressed doubt was assumed by it to be correct for purposes of

decision[42] (*ibid.*). The court was of the view, however, that the ultimate findings were not supported by the basic findings. This view seems to have rested primarily on the court's belief that the standard of "reasonable feasibility" followed by the Commission was unlawful. We believe that it has been demonstrated in Point I, *supra*, that the court erred in so holding. Quite apart from this holding, however, the court took the position that the Commission's own findings negate its conclusion that the proposed authorizations to communicate with The Netherlands and Portugal will serve the public interest.[43] We submit that in this respect the majority below misunderstood the Commission's decision.

A careful reading of the Commission's extensive discussion of the duplicate versus the single circuit policy and the contentions of the parties with respect thereto leads inescapably to the conclusion that the Commission was persuaded that the competition here proposed would benefit the public. The Commission's specific findings that Mackay's proposals did not promise any immediate improvements in service or rates do not refute or cast doubt upon its conclusion that com-

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[42] The overwhelming record support for this finding is discussed *infra*, n. 52, pp. 61–63.

[43] The court said (R. 701): "Any implication that benefit will result is contradicted by the Commission's finding [that Mackay's proposed service would not result in lower rates or speedier service, or be otherwise superior to or more comprehensive than the service now available via RCAC] above."

petition would be beneficial. One frequent benefit of new competition is that it induces *existing* carriers to improve their service. The benefits of competition are not necessarily immediate, and they are not necessarily predictable with any degree of certainty. But the impossibility of documented prophecies does not deprive a regulatory agency of the power and duty to base its judgment upon the future. As was aptly stated in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 192 F. 2d 417, 420 (C. A. D. C.), involving the certification of air freight carriers:

> When a regulatory action contemplates a proposed development, new, not existing, a type of judgment is required which is wholly absent from the mere evaluation of past facts to ascertain a present or past fact. It is in the exercise of that sort of judgment that the much discussed expertise of administrative agencies finds its greatest value. Here is the field of uncertainties, imponderables and estimates. This is where the rule that a conclusion within the realm of rational deduction or inference stands despite differences of opinion, has its greatest applicability.

It is true that in light of the applicability of the national policy in favor of competition to international radiotelegraph, the Commission felt entitled, indeed duty bound, to act on the premise that competition should be regarded as one of the desirable licensing objectives in situations where

it is reasonably feasible.' In these circumstances it was unnecessary for the Commission's decision to have detailed at length the virtues of competition. Nevertheless, the Commission did state that (R. 623):

> Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost. Those seeking the patronage of customers are spurred on to install the latest developments in the art in order to improve their services or products, and in order to enable them to reduce expenses and thereby lower their rates or prices. The benefits to be derived from competition should, therefore, not be lightly discarded."

The Commission painstakingly considered the particular circumstances of record in order to determine whether competition between direct radiotelegraph circuits in fact would be in the

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" We submit that this statement satisfies any requirement that may exist for spelling out the anticipated benefits of competition. The court suggests (R. 701) that the statement was not a specific finding of specific benefits in this case. But to demand such precision is to make it impossible for the agency to promote competition where appropriate. For the exact results of competition in any particular case are necessarily speculative. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. at 89. We do not believe that an administrative agency is debarred from applying the experience of a nation and its own experience to conclude that competition is beneficial. In the case at bar the Commission had the benefit of some 10 years of experience with duplicate direct radiotelegraph circuits to help it make an informed judgment.

public interest. Moreover, it examined in detail the alleged disadvantages of competition in the situation before it. As is demonstrated below, the Commission reasonably concluded that the possibility of such disadvantages here is remote.

It is often argued that competition in industries of a public utility nature involves undesirable duplication of large capital expenditures, and consequently "waste" when the benefits to be derived therefrom could be achieved otherwise. The record in the instant case shows that no such expensive duplication of facilities will be required.

Mackay and RCAC are each engaged in rendering radiotelegraph communication service to many points in the world (R. 560–62), frequently in competition with one another (R. 571, 585, 621). In order to render this service, Mackay maintains radio stations at only two places in the United States (R. 564). At each of these stations Mackay maintains many transmitters and antennae (*ibid.*), any of which can be used to render service to any given point, and which are as a matter of fact, frequently used interchangeably, or to render service to more than one country (R. 586). The authorizations herein granted by the Commission permit Mackay to commence communication with new points, but the record clearly shows that these authorizations will not necessitate the purchase of any new transmitters by Mackay. It will utilize transmitters which it already has at [illegible] its east coast transmitting terminals

(R. 578, 586, 592). The total out of pocket expenditures anticipated are $20,000 (R. 578, 592; *supra*, pp. 13–14). In the event that the competition here authorized should in fact prove harmful to the public interest, and Mackay's authority to communicate with Portugal or The Netherlands should not be renewed, the transmitters and antennae used for that service obviously can be reconverted to the rendition of service to other places. It can thus hardly be contended that any substantial "waste" is involved in the authorization of these circuits.

A second assertedly deleterious effect of competition in this field derives from the fact that competing American radio carriers to a given country usually communicate with the same company in each country.[45] It may be urged that an opportunity thus exists for the foreign company to drive progressively harder bargains by playing one American carrier against the other to its own advantage. This facet of competition between international radiotelegraph carriers was, as the court below indicated (R. 700), a matter of concern to the Commission during the early days of international radiotelegraph communication.[46] The Commission no longer considers this factor to be of major significance. In the present decision, the Commission pointed out that the

[45] In most European countries radio communication is a monopoly, either government owned or controlled.

[46] See n. 17, pp. 19–20, *supra*.

record showed that Mackay would operate its proposed circuits under the same terms and conditions as those on which RCAC operates with respect to the foreign correspondents (R. 572, 590-91, 622). Moreover, the Commission stressed its own authority to prevent action by any American carrier which would result in detriment to the American communications industry or to the public.[47] The record herein provides an example of action of this character which was taken by the Commission. In 1943, Commission action caused RCAC to waive any provisions of contracts between RCAC and its foreign correspondents requiring the latter to send unrouted traffic over RCAC's circuits (R. 563).

One further possible harmful result of competition among radio carriers must be considered. International radiotelegraph communication commenced after cable was well established as a medium for rendering essentially the same service. It was frequently stated during the early days of the growth of international radiotelegraph communication that to permit competition among radio carriers might have the effect of weakening all of them, and retarding or eliminating the growth of radio as an international communications medium.[48]

[47] The Commission keeps itself closely informed of arrangements with foreign communications administrations (*supra*, p. 22).

[48] See p. 40, *supra*.

The record showed that this "protective" factor no longer has any real meaning. Radio has attained a strong position in international communications generally and on these circuits.[29] To the extent that the respondent introduced "protection" as a factor in this proceeding, it was protection of cable, not radio.[30] In addition the volume of international telegraph traffic generally, and the volume on these routes specifically, had increased sufficiently to support additional radio carriers.[31] The tremendous growth of radiotelegraph traffic was found to be in considerable part due to the authorization of additional direct radiotelegraph circuits by the Commission, many of which were duplicate circuits (R. 620).

During the pre-War period the potentially adverse effects of competition were thought, because of circumstances then existing, to outweigh competition's benefits. But the present situation in the international telegraph field is such that, in the Commission's view, these possible adverse effects are of such minor significance that they are outweighed by the benefits reasonably anticipated to flow from competition.

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[29] See pp. 11–12, 19, n. 17, pp. 19–20, *supra*.

[30] The interrelationship of cable and radio, and the effect of these grants on competition between them was carefully considered by the Commission in determining that Section 314 of the Communications Act (47 U. S. C. 314) would not be violated (*supra*, pp. 22–24).

[31] See p. 13, *supra*.

The Commission's conclusion—that competition is to be authorized in the field where reasonably feasible—reflects a distillation of the Commission's considerable experience with duplicate circuit operation. This experience enabled the Commission to exercise an informed judgment as to the conditions necessary for successful duplicate circuit operation. In concluding that competition in direct circuits to The Netherlands and Portugal is feasible, the Commission stressed that this does not mean that it will automatically grant authorizations in order to create additional competition (R. 627). The denial of the Surinam application in the present proceeding (*supra*, p. 24) serves to underline the fact that the Commission carefully balances the countervailing considerations in the case of each application for a duplicating circuit.

We think it plain that facts of record which have been summarized in this brief fully support the conclusion of the Commission that the public interest would be served by the authorizations here at issue. The Commission found that these authorizations will introduce more effective competition between radiotelegraph carriers serving the points involved, and "will increase over-all competition for telegraph traffic generally" (R. 606–7).[62] In the case of The Netherlands, compe-

[62] The finding that over-all competition for telegraph traffic would be increased by the grants made herein was the only one about which the court below expressed any

tition between radio carriers would be introduced, and in the case of Portugal, as to which there had been indirect competition, effective competition by direct circuit would be introduced. The Commission also properly concluded that there was no reasonable basis for anticipating injurious effects from the proposed competition either in the form

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doubt as being supported by the record. The Commission recognized that by virtue of the grants made to Mackay there would be some decrease in cable competition (R. 606–7), since some of Commercial's traffic would be diverted to Mackay on the basis of noncompetitive considerations (R. 609–10). However, its conclusion that there would be an increase in competition among radiotelegraph carriers which would more than off-set this decrease is fully justified by the record. Moreover, it is clear that Mackay's strengthening as a result of these grants will also enhance competition between it and Western Union.

There is ample evidentiary support for the Commission's conclusion (R. 626) that competition by direct radiotelegraph circuit is more effective competition than competition by indirect circuit. Thus, the use of a direct circuit has a greater appeal to potential customers, as is shown both by the testimony of Mackay's Executive Vice President (R. 71), and by the fact that respondent itself, in its solicitation of customers, stresses the fact that its circuits are direct circuits (R. 71–2). The operation of direct circuits also tends to improve a carrier's ability to secure inbound traffic (R. 626). This is accounted for by the efforts of the foreign correspondents, which in the case of The Netherlands is a government-owned radio monopoly, to foster the development of radio as distinguished from cable traffic (R. 90–4). Much of Mackay's increase in the handling of inbound traffic in recent years on other circuits was attributed by its comptroller to its direct circuit operation (R. 101). Although a witness for respondent testified that Mackay was on an equal competitive footing with RCAC as to inbound traffic from Portugal even though Mackay had no direct circuit to that

of degradation of existing service or impairment of the ability of any existing carrier to render service (*supra*, p. 21). Both The Netherlands and Portugal are important traffic centers, and are responsible for a greater volume of traffic than many other countries to which duplicate direct radiotelegraph circuits are operating (*supra*,

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country (R. 387), this testimony is hardly credible since the witness admitted that he meant that Mackay was on an equal footing only because Commercial, its affiliate, could get traffic specifically routed via *cable* by the sender (R. 387–8). Another of respondent's witnesses testified that the reason that respondent handled a much larger proportion of the inbound traffic from Portugal and The Netherlands than of the outgoing traffic to those countries was that the radio correspondent of respondent in the foreign country controlled a greater volume of the traffic (R. 396–7). The handling of additional inbound traffic in turn improves a carrier's competitive position and its ability to develop outbound traffic (R. 626). An RCAC witness testified that despite respondent's claimed superiority of service over that rendered by Mackay there might be a diversion of traffic outbound from the United States from respondent to Mackay because "* * * that incoming message via Mackay going to the customer repeatedly might cause the customer to return his traffic in the same way. There is a tendency on the part of the public to use the type of service outbound that they receive inbound" (R. 384).

In the light of this sharpening of competitive factors, the Commission's finding that over-all competition will be increased as a result of the grants in this case can hardly be considered unreasonable. This is particularly so when it is considered that the Commission, by making these grants, has in the case of The Netherlands added a new competitor to the field. Although some of the traffic formerly handled by Commercial will be diverted to Mackay, Commercial will nevertheless remain active in communications in these countries, and will continue to solicit messages (R. 256).

p. 12). There was, therefore, solid basis for the Commission's conclusion that the competition herein authorized was reasonably feasible. The Commission's ultimate determination that this competition would be in the public interest clearly rests on appropriate subsidiary findings and represents a reasoned exercise of administrative judgment based on the facts disclosed by the record.

The Commission has a broad area of discretion in determining the extent to which competition should be permitted in the common carrier industries which it regulates. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. In exercising this discretion, it cannot articulate the considerations involved in any precise mathematical form. As this Court said of the appraisal by the Interstate Commerce Commission of transportation cost figures, "unlike a problem in calculus, [they] cannot be proved right or wrong." *New York* v. *United States*, 331 U. S. 284, 328. And as was more recently said in *National Labor Relations Board* v. *Seven-Up Bottling Company of Miami, Inc.*, 344 U. S. 344, 348:

> Nor should we require the Board to make a quantitative appraisal of the relevant factors, assuming the unlikely, that such an appraisal is feasible. As is true of many comparable judgments by those who are steeped in the actual workings of these specialized matters, the Board's conclu-

sions may "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions * * *"; and they are none the worse for it. *Chicago, Burlington & Quincy R. Co.* v. *Babcock*, 204 U. S. 595, 598. It is as true of the Labor Board as it was of the agency in the *Babcock* case that "[t]he Board was created for the purpose of using its judgment and its knowledge."

We submit that the Commission has properly used its judgment and knowledge in the case at bar.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed and the order of the Commission authorizing Mackay to communicate with The Netherlands and Portugal should be affirmed.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

BENEDICT P. COTTONE,
General Counsel,
J. ROGER WOLLENBERG,
Assistant General Counsel,
ASHER H. ENDE,
STANLEY S. NEUSTADT,
Counsel,
Federal Communications Commission.

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APPENDIX

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.*

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

SECTION 309 (a). If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. * * *[1]

APPLICATION OF ANTITRUST LAWS

SECTION 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. * * *

PRESERVATION OF COMPETITION IN COMMERCE

SECTION 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or

[1] Editorial changes in this section were made subsequent to the issuance of the Commission's decision herein.

controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio * * * shall * * * directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, * * * if * * * the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; * * *

REPEALS AND AMENDMENTS

SECTION 602 (d). The first paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, is amended to read as follows:

"SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: * * * in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; * * * to be exercised as follows:"

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